No. 86-1442

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN DOE,
Cross-Petitioner

v.

ROBERT M. GATES,
ACTING DIRECTOR OF CENTRAL INTELLIGENCE

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY MEMORANDUM FOR THE CROSS-PETITIONER

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Dated: May 11, 1987

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REPLY MEMORANDUM FOR THE CROSS-PETITIONER

Cross-petitioner submits this reply memorandum to correct two misstatements in respondent's memorandum in opposition concerning the record below and to address one particularly erroneous mistatement of law.

1. Respondent asserts that Doe is not a tenured employee and that he does not argue to the contrary. (Resp. Mem. at 2-3.) This is not so. Doe successfully completed a year-long probationary period with the CIA. (C.A. App. at 18). For this and other reasons set forth at page 4 of his petition, Doe asserts that he has a property interest in continued employment with the CIA. *See Ashton* v. *Civiletti*, 613 F.2d 923, 929 (D.C. Cir. 1979) (conversion from probationary to non-probationary status creates a property interest protected by the due process clause).

2. Respondent also asserts that Doe never relied on 5 U.S.C. § 555(e) in the courts below. (Resp. Mem. at 7.) To the contrary, Doe specifically argued in his motion for summary judgment that section 555(e) entitles him to a statement of reasons for his termination. (Plaintiff's Memorandum of Points and Authorities in Support of His Motion for Summary Judgment at 22-23.)

3. Respondent's argument that section 555(e) does not apply to termination decisions also requires a brief response. Respondent reasons that since employee selection and tenure decisions are exempt from the formal hearing procedures of 5 U.S.C. § 554, they also are exempt from the requirements of section 555. However, the exceptions to section 554 apply only to that section and not to section 555. *See Roelofs* v. *Secretary of the Air Force*, 628 F.2d 594, 599-600 (D.C. Cir. 1980).

Contrary to the premise underlying respondent's argument, Doe has never claimed entitlement to the formal hearing procedures of section 554. Instead, he has consistently characterized his termination as an informal adjudication that is subject only to the minimal procedures of notice of the reasons for the adverse determination and a meaningful opportunity to respond. Apart from his claims to constitutionally guaranteed due process, Doe contends that these procedures are guaranteed both by general principles of administrative fairness embodied in the Administrative Procedure Act and the specific provisions of section 555(e). *Roelofs* v. *Secretary of the Air Force*, 628 F.2d at 599-600. As the court held there, the fact that an agency proceeding is informal "does not negate the applicability of § 555(e)." *Id.* at 600.

The cases cited at page 8 of respondent's memorandum do not support his contention that section 555(e) does not apply to termination decisions. Two of the cited cases, *Normile* v. *McFague*, 685 F.2d 9 (1st Cir. 1982), and *King* v. *Hampton*, 451 F.2d 247 (8th Cir.), *aff'g* 327 F. Supp. 714 (E.D. Mo. 1971), discuss the exception to the

formal hearing requirements of section 554 for selection and tenure decisions and do not specifically address section 555(e). The court in *Bollow* v. *Federal Reserve Bank*, 650 F.2d 1093, 1101 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982), citing the section 554 exception, noted that "the APA's hearing procedures do not apply to disputes regarding the tenure of employees." The court did not explain, however, how the section 554 exception applied to a request invoking the informal procedures of section 555(e). Moreover, the court went on to hold that section 555(e) did not apply to that plaintiff's termination because he was employed under a statutory scheme that afforded his employer "unfettered" discretion to fire employees. *Id.* at 1102.[1] The remaining cases cited by respondent simply hold that selection and tenure decisions are not subject to the requirements of section 554, an issue not involved in this case.

For the foregoing reasons and those set forth in the cross-petition, the cross-petition for a writ of certirorari should be granted.

Respectfully submitted,

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[1] In contrast to section 102(c) of the National Security Act of 1947, 50 U.S.C. § 403(c), the statute at issue in *Bollow* authorized the Federal Reserve Bank to dismiss officers and employees "at pleasure." 12 U.S.C. § 341. *See* 650 F.2d at 1097.